APPENDIX "A"

OPINION OF THE COURT OF APPEALS

UNITED STATES OF AMERICA
Plaintiff

v.

WILL LYONS
FRANKIE ROBERTS
EDWARD GERALD McNEELY JR.
Defendants

NOS. 80-5408
80-5421
81-5038

United States Court of Appeals
Sixth Circuit
December 11, 1981

Before: ENGLE and KENNEDY, Circuit Judges, and PECK, Senior Judge

These appeals follow the conviction of defendants Edward Gerald McNeely, Jr., Frankie Roberts, and Will Lyons on numerous charges arising out of an extensive multistate drug operation with its principal operations being directed by the defendant Edward Gerald McNeely

from Culver City, California, and involving actual sales of drugs in Memphis, Tennessee, where the case was tried. Although variously stated, the three consolidated appeals here challenge the validity of a search of the Culver City residence of defendant McNeely at the time he and defendant Roberts were arrested and the subsequent introduction into evidence of certain drug paraphernalia and other evidence seized at that time. Defendants Roberts and Lyons also assert that there was insufficient evidence upon which a jury could find them guilty of any conspiracy. Numerous instances of prosecutorial misconduct are also alleged.

Further, it is claimed by McNeely and Lyons that the trial court erred in imposing consecutive sentences for their convictions on the conspiracy and substantive counts because both counts

involve the same elements and were prosecuted with identical evidence. Roberts argues that her acquittal on the substantive count of sale of heroin barred her conviction for conspiracy as it encompassed the identical evidence. Finally, defendant McNeely asserts that the trial judge unlawfully enhanced his sentence by misapplying the provisions of the dangerous special drug offender statute, 28 U.S.C. 849, by failing to comply with the statutory requirements, and because of the government's failure to provide him with a proper notice of its intention to seek such sentence enhancement.

The trial in the district court was extensive, commencing on August 4, 1980, and continuing until a verdict was reached on all counts except count 2, on August 21. At the severed trial of count 2 commenced thereafter defendant McNeely

was charged with engaging in a continuing criminal enterprise, 21 U.S.C. 848. That trial, however, resulted in acquittal.

The most difficult issue concerned the propriety of the pre-dawn arrest of defendants McNeely and Roberts at McNeely's well guarded California home, an arrest undertaken by Drug Enforcement Administration agents assisted by a special team of officers provided by California State law enforcement authorities. The officers employed a battering ram to gain access to the residence and to execute the arrest warrants.

Upon a consideration of the record as a whole, including all of the circumstances attendant to the arrest and the information reasonably known and understood by the arresting officers, the court is unable to disagree with the district court determination that the

police conduct was justified by exigent circumstances. McNeely was known and believed to have been extensively involved in the heroin traffic and had a well established criminal record. Information possessed by the police, although not too fresh, indicated that McNeely might be protected by armed guards and it was not unreasonable to have anticipated that a shootout might occur unless quick action were taken following the discovery of police presence by those inside. Entry into the house revealed the presence of fourteen individuals inside and numerous weapons as well as the drug paraphernalia.

During the course of the trial, it is charged that numerous instances of prosecutorial misconduct occurred, including the failure to make timely and full disclosure of discovery materials sought by the defense, the improper

injection of evidence concerning involvement of one of the unindicted coconspirators, Joyce Brown, in two murders, and the suggestion by a government witness to the jury that defendant McNeely may have been the subject of a tax evasion investigation. It is also claimed that the government unfairly sought to impeach the testimony of McNeely's mother concerning his inherited wealth by cross-examination, and that the trial judge erroneously refused to permit the defense to introduce rehablitating evidence through the records of certain probate proceedings relating to McNeely's father's estate in California. While such charges are not entirely without merit, the court is unable to hold that, either singly or together, they were of such gravity as to deny the defendants a fair trial or to have affected their

substantial rights.

The claim by McNeely and Lyons that their consecutive sentences were not appropriate because of the identity of evidence on counts 1 and 4 is without merit, it being well settled that the commission of a substantive offense and a conspiracy are separate offenses, Pinkerton v. United States, 328 U.S. 640 (1946), and it further appearing that there was different and separate evidence to support convictions on each count. Roberts' similar argument is also without merit.

Finally, the enhanced sentence imposed upon defendant McNeely as a dangerous special drug offender was supported by a sufficient notice which complied with the requirements of the statute and otherwise appears to have been adequately supported by the record and by the findings of the district

judge. United States v. Ilacqua, 562 F.2d 339 (6th Cir. 1977).

The court is further of the opinion that none of the other errors alleged by the defendants was of sufficient merit or gravity to warrant reversal.

Accordingly,

IT IS ORDERED that the judgment of the district court in each of the above appeals is affirmed.

APPENDIX "B"

OPINION OF THE COURT OF APPEALS

UNITED STATES OF AMERICA
Plaintiff

v.

FRANKIE ROBERTS
EDWARD GERALD McNEELY, JR.

NOS. 80-5421
81-5038

United States Court of Appeals
Sixth Circuit
August 27, 1982

Before: ENGEL and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge

No active judge having requested a vote on the suggestion of appellants McNeely and Roberts for a rehearing en banc of their petition filed in the above case, the petition was referred to the same panel which heard the appeal.

Appellants' petition urges in argument B.4 that this court failed to

state the reasons for its disposition of the review of the enhanced sentence imposed upon defendant McNeely as required by 21 U.S.C. 849(h), which provides:

> Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felonious violation and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, [impose a sentence itself, or remand] . . . The court of appeals shall state in writing the reasons for its disposition of the review of the sentence (emphasis added).

While the court believes it would indeed be desirable and perhaps mandatory to make very particularized findings if the appellate court exercised the power conferred upon it to impose or direct the

imposition of a sentence which differs from that imposed by the district court, where, as here, such disposition is not made, it is of the opinion that the determinations made in its earlier order are sufficient. Accordingly, the court finds that there was sufficient compliance on its part with section 849(h) under the circumstances here. The court further finds that there was no other issue raised in the petition which has not already been fully and adequately considered and disposed of earlier.

The appellants further urge that the enhanced sentence imposed by Judge Wellford under 21 U.S.C. 849 was unlawful because Judge Wellford did not first impose the maximum penalty allowable for the specific offense. Treating the consecutive seventeen and one-half year sentences imposed as one complete sentence of thirty-five years,

petitioners further claim that such was unlawful because it exceeded the twenty-five year maximum sentence provided under 21 U.S.C. 849(b). Upon consideration the court is of the opinion that neither contention has merit.

An examination of the commitment order and of the statements made upon the record by Judge Wellford at the time of sentencing satisfy us that the sentences imposed were well within his discretion under the special enhancement provisions of the Controlled Substances Act. Regardless whether Judge Wellford could properly have imposed one sentence under 21 U.S.C. 846 and a special enhancement under 21 U.S.C. 849, the record here is clear that he did not in fact do so but instead properly imposed a total sentence of seventeen and one-half years for each offense under Section 849. This appears from the actual judgment of commitment

and we are satisfied that Judge Wellford's explanation made on the record of his subjective thought processes in reaching that conclusion are simply that and do not amount to double sentences but rather a reflection upon the record of Judge Wellford's view of the kind of a sentence which would have been appropriate to the particular offense had not the enhancement been taken into account. While 21 U.S.C. 849(b) provides the sole means of sentencing a dangerous drug offender under that statute, the trial judge's explanation of his subjective calculations of the appropriate amount do not, in our judgment, amount to a double sentencing under both the underlying law prescribing the penalties for the particular violation and under the enhancement provisions of 849(b). Likewise the court is of the opinion that there is nothing

in the statute to prevent the imposition of consecutive sentences of each of the counts of which the defendant was found guilty. Different evidence was required for proof of each and there is present no basis for asserting that punishment under the two counts was either merged, or amounted to double jeopardy, or that one was subsumed in some way in the other.

The court is of the opinion that all other issues raised in the petition have already been satisfactorily addressed in the original order of affirmance. Accordingly,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

## APPENDIX "C"

Federal Rules of Criminal Procedure,

Rule 41:

> . . . (c) . . . The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.
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> . . . (h) . . . The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time.

Title 18, United States Code,

Section 3109:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Title 21, United States Code,

Section 849:

> . . . (b) Upon any plea of

guilty or nolo contendere or verdict or finding of guilty of the defendant of such felonious violation, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be

entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felonious violation and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special drug offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felonious violation. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felonious violation. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

. . . (e) A defendant is a special drug offender for purposes of this section if -- (1) the defendant has previously been convicted in

courts of the United States or a State or any political subdivision thereof for two or more offenses involving dealing in controlled substances, committed on occasions different from one another and different from such felonious violation, and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felonious violation, and less than five years have elapsed between the commission of such felonious violation and either the defendant's release, or parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense involving dealing in controlled substances and punishable by death or imprisonment in excess of one year under applicable laws of the United States or a State or any political subdivision thereof; or

(2) the defendant committed such felonious violation as part of a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felonious violation

was, or the defendant committed such felonious violation in furtherance of, a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing, or give or receive a bribe or use force in connection with such dealing. A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such dealing. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, without reference to exceptions, under section 206(a)(1) of Title 29 for an employee engaged in commerce or

in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declare adjusted gross income under section 62 of Title 26. For purposes of paragraph (2) of this subsection, special skill or expertise in such dealing includes unusual knowledge, judgment or ability, including manual dexterity, facilitation the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of such dealing, the enlistment of accomplices in such dealing, the escape from detection or apprehension for such dealing, or the disposition of the fruits or proceeds of such dealing. For purposes of paragraphs (2) and (3) of this subsection, such dealing forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

. . . (f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felonious violation is required for the protection of the public from

further criminal conduct by the defendant.

. . . (h) With respect to the imposition under this section, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the

procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felonious violation and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could orginally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court

of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of the abuse of the right of the United States to take such review.